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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a Corporation,
Plaintiff in Error,

v.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian *ad litem*,
Defendants in Error.

Memorandum of Authorities Opposing Motion to Strike Bill of Exceptions

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Names and Addresses of Attorneys of Record:

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Upon Writ of Error to the District Court of the United States for the District of Oregon.

On October 19th, four days before the date this cause is set for hearing in this court, the defendant in error served upon plaintiff in error a motion to strike the bill of exceptions. The only ground of the motion that is argued upon the brief of defendant in error in support of the motion is that the bill of exceptions does not conform to Subdivision 2 of Rule 4 of the Supreme Court of the United States.

We think the motion to dismiss is not well taken on a number of grounds and will briefly refer to them.

1. This writ of error is prosecuted because of the refusal of the trial court to direct a verdict for the

defendant. An exception to the refusal was duly reserved, is certified by the trial judge in the bill of exceptions and is the only exception that is presented by the plaintiff in error. We believe it is elementary that the consideration of such an exception requires bringing before the appellate court all of the evidence taken in the court below. It has been so ruled by this court and by the United States Supreme Court.

First National Bank v. Moore, (9th C. C. A.) 148 Fed. 953.

Crowe v. Trickey, 204 U. S. 235, 51 L. Ed. 458.

It has been so ruled in the eighth circuit.

National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 777.

Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. 347, 353.

The defendant in error has failed to distinguish between a case in which exceptions are reserved and assignments based thereon to rulings on the admission of evidence and upon the instructions as to the law given or refused. Such are the cases of *Rosen et al v. U. S.,* 271 Fed. 651, and *Linn v. U. S.,* 251 Fed. 476, 483, both of which arose in the second circuit and in neither of which was there presented a motion for directed verdict. Each of those cases involved numerous assignments of error going to particular rulings and the complaint was that the entire record was taken up when only that portion of the record

referring to the particular rulings assigned as error should have been submitted to the appellate court.

2. The bill of exceptions in this case conforms to the rules of this court and this court has the exclusive right to make its own rules governing law actions.

Rule 10 of this court provides the form and contents of a bill of exceptions and in that rule this court adopts only Subdivision 1 of Rule 4 of the Supreme Court of the United States. This court has not seen fit to adopt the second subdivision of Rule 4 of the Supreme Court of the United States, providing the manner in which the bill of exceptions shall be made. We submit that when this court eliminates from its rules the suggestion of the United States Supreme Court contained in Subdivision 2 of Rule 4 of that court it is notice to the bar that Rule 4 of the United States Supreme Court is not in its entirety adopted here. This immediately raises the question whether it is competent for this court to make its own rules (even though its rules do not place the same limitations upon procedure that obtain in the United States Supreme Court) and whether it is competent for the United States Supreme Court to make rules governing this court in law actions.

We all know that Section 917, Revised Statutes, gives to the United States Supreme Court plenary power to prescribe rules governing the practice in all of the federal courts in suits in equity or admiralty.

Pursuant thereto such rules have been prescribed governing the procedure in equity and admiralty in the district and circuit courts and the same is true of the authority granted in the bankruptcy act.

This is not true of law actions. For some years there has been a movement put forth by the American Bar Association to grant this power to the supreme court as to actions at law. However, congress has not seen fit to extend this authority to the supreme court. It is elementary that in the absence of statutory restrictions each court has authority to make rules of procedure for itself, and in the absence of a statute granting such authority to the supreme court it may not make rules governing procedure in inferior courts (15 *Corpus Juris* 904).

Now, then, congress has given to the Circuit Court of Appeals for the Ninth Circuit plenary power to make its own rules. Section 122 of the judicial code provides:

> "Each of said circuit courts of appeals shall prescribe the form and style of its seal and the form of writs and other process and procedure * * * and shall have power to establish all rules and regulations for the conduct of the business of the court. * * *"

Pursuant to this statutory authorization this court has promulgated Rule 10, calculated to limit a bill of exceptions so that the record may present the particular question of law suggested on appeal, and elimi-

nates an exception to the instructions *in solido*. This court has not changed the rule that all of the record must be brought up for a proper consideration of an exception based upon a refusal to direct a verdict and it has not seen fit to adopt that portion of Rule 4 of the United States Supreme Court requiring that the evidence in the bill of exceptions be presented by recital.

We seriously doubt whether a bill of exceptions containing any thing short of all of the evidence in the case would be sufficient to raise the question of error in denying a directed verdict in the Supreme Court of the United States, in a case of the nature that could reach that court. However that may be, Rule 4 of the Supreme Court of the United States, valid as a rule of that court, suggestive and admonitory to the district courts, is hardly binding upon this court, which by law is granted power to make its own rules. In any event, until this court has seen fit to advise the bar that it has adopted the rule of the United States Supreme Court, it would hardly be an act of justice to cast out of court a litigant who observes the rules of this court.

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